Abdul Johari bin Abdul Rahman v Lim How Chong & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A-02-658-1995
SITI NORMA YAAKOB, ABDUL MALEK AHMAD JJCA AND MOHD NOOR AHMAD J
2 JULY AND 11 OCTOBER 1996

Civil Procedure *— Amendment — Defence — Claim for vacant possession of premises — Amendment of defence and counterclaim to include defence that respondents were entitled to lease of premises — No basic departure in amended pleadings — No prejudice to the other party if amendment was allowed — Whether amendment should be allowed — Rules of the High Court 1980 O 20*

The appellant filed an action against the respondents for failure to pay rental of premises ('the hotel') owned by the appellant. In his statement of claim dated 9 July 1993, he prayed for an order of vacant possession, damages at RM25,000 a month with effect from 1 April 1993, interest, cost and other relief. The prayer on damages was amended on 10 November 1993 which gave an alternative date of 1 June 1993 for vacant possession. The statement of defence dated 30 May 1994 by the third, fourth and sixth respondents ('the other respondents') contended that the appellant's notice to quit was invalid and had no legal effect. The respondents counterclaimed for a declaration that the partnership which they were in, ie the hotel, was entitled to a tenancy for 30 years or for a period deemed appropriate by the court as well as damages and other relief. The fifth respondent filed his statement of defence on 25 September 1993 and later amended his pleadings on 12 October 1993. By summons in chambers dated 3 January 1994, the appellant applied for leave to amend the writ and statement of claim. Eventually, the other respondents and the fifth respondent applied to amend their statements of defence and counterclaims. The fifth respondent proposed to amend his pleadings in order to plead facts which he submitted would entitle him to a lease to the hotel for 99 years. The other respondents applied to amend their pleadings to be on line with the amendment proposed by the fifth respondent. The deputy registrar dismissed both applications. The parties appealed against the deputy registrar's decision and the judge allowed both appeals. The appellant subsequently appealed. The issue before the court was whether the respondents should be allowed to amend their pleadings.

Held, dismissing the appeal:

The authorities had strongly indicated that the courts should lean towards granting applications for amendments even when a new cause of action or line of defence was raised provided that it was based on the same facts or arose out of the same transaction subject

to an award of costs to the other party for the injustices caused by the amendments. On these considerations, the judge in the court below was right in allowing the appeals as there was no basic departure in the amended pleadings from the original pleadings and thus, the appellant could not be said to be really prejudiced if the amendments were allowed (see p 640F–G); *Hongkong Bank (M) Bhd v Raja Letchumi a/p Ramarajoo & Ors* [1996] 2 MLJ 34, *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97, *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213, *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230, *Palaniappan v Universiti Pertanian Malaysia* [1995] 1 MLJ 353, *Grant Advertising International Inc & Anor v Glaze* [1968] 1 MLJ 31 and *Ketteman & Ors v Hansel Properties Ltd & Ors* [1987] 1 AC 189 followed.

[Bahasa Malaysia summary

Perayu memfailkan suatu tindakan terhadap penentang-penentang atas kegagalan membayar sewa premis ('hotel tersebut') yang dimiliki oleh perayu. Dalam pernyataan tuntutannya bertarikh 9 Julai 1993, dia meminta perintah milikan kosong, ganti rugi sebanyak RM25,000 sebulan mulai dari 1 April 1993, faedah, kos dan relief lain. Permintaan atas ganti rugi dipinda pada 10 November 1993 yang memberikan tarikh alternatif 1 Jun 1993 untuk milikan kosong. Pernyataan pembelaan bertarikh 30 Mei 1994 oleh penentang-penentang ketiga, keempat dan keenam ('penentang-penentang lain') berhujah bahawa notis keluar perayu adalah tak sah dan tidak mempunyai kesan dari segi undang-undang. Penentang-penentang membuat tuntutan balas untuk suatu deklarasi bahawa perkongsian mereka, iaitu dalam hotel tersebut, berhak kepada suatu penyewaan selama 30 tahun atau untuk jangkamasa yang difikirkan wajar oleh mahkamah dan juga ganti rugi dan relief lain. Penentang kelima memfailkan pernyataan pembelaannya pada 25 September 1993 dan meminda plidingnya pada 12 Oktober 1993. Melalui saman dalam kamar bertarikh 3 Januari 1994, perayu memohon kebenaran untuk meminda writ dan pernyataan tuntutan. Akhirnya, penentang lain dan penentang kelima memohon untuk meminda pernyataan pembelaan dan tuntutan balas mereka. Penentang kelima bercadang untuk meminda plidingnya supaya boleh menghujahkan fakta yang ditegaskannya akan memberikannya pajakan kepada hotel tersebut selama 99 tahun. Penentang-penentang lain memohon untuk meminda pliding mereka supaya selaras dengan pindaan yang dicadangkan oleh penentang kelima. Penolong pendaftar menolak kedua-dua permohonan itu. Pihak-pihak telah merayu terhadap keputusan penolong pendaftar dan hakim membenarkan kedua-dua rayuan. Perayu kemudiannya merayu. Isu di hadapan mahkamah adalah sama ada penentang-penentang patut dibenarkan untuk meminda pliding mereka.

Diputuskan, menolak rayuan:

Autoriti menunjukkan bahawa mahkamah harus membenarkan permohonan untuk pindaan jikapun suatu kausa tindakan atau barisan pembelaan yang baru ditimbulkan melainkan ia adalah berdasarkan fakta yang sama atau timbul daripada transaksi yang sama tertakluk kepada suatu award kos kepada pihak lain atas ketidakadilan yang disebabkan oleh pindaan-pindaan itu. Atas pertimbangan-pertimbangan ini, hakim di mahkamah bawah adalah betul dalam membenarkan rayuan-rayuan kerana tiadanya penyimpangan asas dalam pliding yang dipinda daripada pliding asal dan dengan itu, tidak boleh dikatakan ia benar-benar memudaratkan perayu jika pindaan dibenarkan (lihat ms 640F–G); *Hongkong Bank (M) Bhd v Raja Letchumi a/p Ramarajoo & Ors* [1996] 2 MLJ 34, *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97, *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213, *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230, *Palaniappan v Universiti Pertanian Malaysia* [1995] 1 MLJ 353, *Grant Advertising International Inc & Anor v Glaze* [1968] 1 MLJ 31 dan *Ketteman & Ors v Hansel Properties Ltd & Ors* [1987] 1 AC 189 diikut.]

Notes

For amendment of defence, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 205–243.

Cases referred to

Grant Advertising International Inc & Anor v Glaze [1968] 1 MLJ 31 (folld)

Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 230 (folld)

Hongkong Bank (M) Bhd v Raja Letchumi a/p Ramarajoo & Ors [1996] 2 MLJ 34 (folld)

Ketteman & Ors v Hansel Properties Ltd & Ors [1987] 1 AC 189 (folld)

Palaniappan v Universiti Pertanian Malaysia [1995] 1 MLJ 353 (folld)

Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (folld)

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213 (folld)

Legislation referred to

Rules of the High Court 1980 O 20

Appeal from: Civil Suit No 22–140–1993 (High Court, Ipoh)

Gurbachan Singh (*Bachan & Kartar*) for the appellant.

A Iruthaya Raj (*Raj Selva & Co*) for the first, third, fourth and sixth respondents.

Chee Weng Weng (*Chee Weng Weng & Co*) for the fifth and seventh respondents. A

Cur Adv Vult

Abdul Malek Ahmad JCA (delivering the judgment of the court): The Hollywood Hotel has been operating at Nos 72, 74 and 76 Chamberlain Road (now Jalan CM Yusof) in Ipoh since 1958. It is now being sued as the seventh respondent with six others, the latter of whom are its managing partners, by the appellant — its new owner who runs Rahman Restaurant next door at No 78 — for failing to quit the premises when asked to do so by him on 22 April 1993. The second respondent had never participated in the proceedings at any stage. B C

For this appeal, the issue appeared to be simple enough; and that is whether the respondents should be allowed to amend their pleadings at this juncture. Order 20 of the Rules of the High Court 1980 provides for amendments to be made to the writ and pleadings once at any time before the pleadings are deemed to be closed without the leave of the court and also for the court to allow at any stage of the proceedings for any party to amend their pleadings on such terms as to costs or otherwise as may be just and in such manner as it may direct. D

By a sale and purchase agreement dated 22 September 1992, the appellant had purchased premises Nos 72, 74, 76, 78, 80, 82, 84, 86, 90, 92 and 94 Jalan CM Yusof from Loke Wai Yat Realty (Perak) Sdn Bhd ('the vendor') for RM4,375,000 subject — as regards Nos 72, 74 and 76 — to a month-to-month tenancy between the respondents and the vendor at RM5,100 a month. E

By a letter dated 24 March 1993, the appellant had informed the respondents that the rental for Nos 72, 74 and 76 would be raised to RM25,000 a month with effect from 1 April 1993. By another registered letter dated 22 April 1993 — which was in fact a notice to vacate — the appellant agreed to allow the respondents to continue renting the premises on condition that they pay the new rental of RM25,000 a month on or before the 10th day of every month and that the rental would be on a month-to-month basis with the requirement of one month's notice to terminate the tenancy. If the conditions were not agreed to, the appellant had given the respondents notice to quit by 31 May 1993. F G

The fifth respondent had offered rental of RM20,000 a month and had furnished the relevant details to prepare a new tenancy agreement but had subsequently refused to go ahead with his offer. By letter dated 29 June 1993, in reply to the appellant's letter dated 22 April 1993, the respondents had imposed the following conditions if they were to accept the appellant's offer, namely: H

(a) the tenancy would be for a minimum period of two years from the date of the signing of the tenancy agreement; I

(b) the rental would be RM13,000 a month including a car park from the date of the signing of the tenancy agreement; and

(c) the appellant would undertake to buy over all the movable items — including air conditioners and television sets — and to pay compensation, this being the costs for all renovation works at the present market price to be verified by an independent competent valuer at the termination of the tenancy.

The appellant, as expected, did not agree with the proposed conditions and told the respondents to vacate the premises. The respondents refused to do so and continued to occupy the premises at the existing rental of RM5,100 — payment of which had been refused by the appellant each time it was tendered on the ground that he had already increased the rental to RM25,000 with effect from 1 April 1993.

As the situation has continued to the present day, the appellant had in his statement of claim dated 9 July 1993 prayed for an order for vacant possession by the respondents of the said premises within 30 days of the order, damages at RM25,000 a month with effect from 1 April 1993, interest, costs and other relief. This was amended on 10 November 1993 where the prayer for damages gave the alternative date of 1 June 1993 for vacant possession, depending obviously on which letter the court would hold as the relevant notice to quit.

In their statement of defence dated 30 May 1994, the third, fourth and sixth respondents contended that the appellant's notice to quit was invalid and had no legal effect. They denied having any discussions without prejudice with the appellant and even if the court were to hold that such discussions were held, they did not lead to any conclusive agreement.

They further went on to plead that they were entitled to remain on the said premises as they had done so since July 1958 with the consent and permission of the predecessors in title, namely, the vendor and having paid RM25,000 to the vendor to operate Hollywood Hotel, they had been allowed to remain on the premises for so long as they operated the hotel and paid the monthly rental of RM2,100 for the hotel and RM50 for the adjoining land which was used as a car park. The rental had been periodically reviewed and the latest arrangement was a monthly rental of RM5,000 for the hotel and RM100 for the car park. On this premise, the respondents had spent RM250,000 for renovations and refurbishments and RM15,000 as rental deposit.

The third, fourth and sixth respondents further pleaded that the appellant must have actual or constructive knowledge of the special circumstances as he and his father operated Rahman Restaurant next door and was bound in conscience by the respondents' equity over the said premises and the court must require the appellant to satisfy that equity. They also averred that the appellant was not a bona fide purchaser of the said premises without knowing the respondents' rights to the said premises and should be required to comply with the equitable representations and obligations of the vendor and that they were quite willing to continue with the present tenancy terms with the appellant.

Accordingly, they had counterclaimed for a declaration that the partnership known as Hollywood Hotel was entitled to a tenancy for

30 years or for a period deemed appropriate by the court, damages, the refund of all the money spent on all renovation works on the said premises, any further or other relief, all consequential directions and costs.

The statement of defence of the fifth respondent dated 25 September 1993 stated that the respondents were entitled to the actual possession of, and to rent, the said premises for a period of three years with effect from October 1992. He was not aware of the sale and purchase agreement between the appellant and the vendor. He pleaded that the letters dated 24 March 1993 and 22 April 1993 to increase the rental and to vacate the premises with certain conditions were wrong in law and had no legal effect. Whatever discussions that were held between the parties were without prejudice and should not be pleaded.

The fifth respondent further pleaded that in July 1958, the predecessors in title namely, the vendor, had agreed with Yong Kim Chin — the trustee for Hollywood Hotel — to construct the said premises for the purpose of renting it to the trustee who was to operate the hotel and that the said trustee had paid the vendor RM25,000 as contribution for the construction thereof. Subsequently, the trustee and the partners of Hollywood Hotel had continued to rent the said premises from the vendor for more than 35 years since 1958 at a monthly rental of RM2,100 and for RM50 a month for the empty lot at the rear. In 1992, the monthly rental was increased to RM5,000 for the said premises and RM100 for the empty lot.

He went on to aver that in September or October 1992, the vendor through its authorized agent had represented to him as a partner of Hollywood Hotel that they would allow them to continue occupying the premises with a written tenancy agreement for three years from that date at RM5,000 a month for the premises and RM100 a month for the empty lot at the rear. They also allowed Hollywood Hotel to make renovations and refurbishments on the condition that Hollywood Hotel pay to the vendor an advance deposit equivalent to three months' rental, namely RM15,000. Based on these representations, Hollywood Hotel paid the vendor the RM15,000 deposit, the monthly rentals and had renovated and refurbished the said premises at the cost of RM250,000. He had consequently claimed the refund of the RM25,000 contribution, the renovation and refurbishment expenses totalling RM250,000 or such other sum to be assessed by the court, interest, costs and other appropriate relief.

The fifth respondent had amended his pleadings on 12 October 1993 stating that as a partner and trustee of Hollywood Hotel, he was entitled to rent the premises for three years effective from October 1992. The only other amendments were as regards the fact of the trusteeship. The appellant had joined issue with the fifth respondent on 10 November 1993.

By summons in chambers dated 3 January 1994, the appellant had applied for leave to amend the writ and statement of claim. There were only two amendments. The first was to state that the first to the sixth respondents were partners of the seventh respondent. The second is

unexplained because it is similar to the one made on 10 November 1993 as regards the alternative date of 1 June 1993 depending on which letter is the notice to quit.

The first respondent's statement of defence and counterclaim dated 17 June 1994 were on the same lines as that of the third, fourth and sixth respondents and that of the fifth respondent. The appellant's reply to the counterclaim of the third, fourth and sixth respondents is dated 9 August 1994.

Eventually, the fifth respondent had applied to amend his statement of defence and counterclaim on 18 February 1995 and the first, third, fourth and sixth respondents had done likewise on 15 July 1995. The learned deputy registrar had dismissed both applications on 15 August 1995 but on 26 September 1995, the learned judge had allowed both appeals against the learned deputy registrar's decision with costs in the cause. Hence this appeal.

Let us first examine the amended statement of defence and counterclaim of the fifth respondent dated 26 September 1995. In essence, he stated that as the managing partner and trustee and being in lawful occupation of the said premises at all material times, he was entitled to a tenancy thereof coupled with an equity to operate the business of a hotel as long as the trustee required it to be so. He had also referred to the agreement dated 21 July 1958 between the vendor and Yong Kim Chin as trustee and the payment of RM34,000 as service charges to two named brokers.

He had further pleaded that the appellant had notice of the antecedent arrangement and agreement between the vendor and trustee and had purchased the said premises with notice of and subject to the existing rights and tenancy coupled with an equity. He maintained that because of this, he was entitled to a lease of 99 years which is enforceable in equity and in law against the vendor and the appellant. He also stated that the deposit of RM15,000 had been transferred by the vendor to the appellant. He had further pleaded that he was entitled to the lease for as long as he, as trustee, desired it; and in law, this was 99 years provided a monthly rent of RM5,100 was paid to the appellant. In the counterclaim, he had asked for a declaration that the trustee of Hollywood Hotel was entitled to a tenancy coupled with an equity for a lease of 99 years or for such period as may be deemed reasonable by the court.

The amended statement of defence and counterclaim of the first, third, fourth and sixth respondents dated 28 September 1995 had only one amendment; and that is in the prayer for a declaration in the counterclaim where the lease is now amended to 99 years from 30 years originally. Obviously, this was to be in line with the amendment proposed by the fifth respondent.

To get a clearer picture of the situation, it is pertinent to first reproduce the finding of the learned deputy registrar as regards the two applications to amend the statements of defence and counterclaims:

On perusal of the application and affidavits of both defendants vide encls 91 and 78 and on hearing the submissions of respective counsel, the court is of the view that the defendants have, by their application to amend, proposed to depart from a line of defence which they had previously chosen, and which may have led the plaintiff into a certain position. As such, the defendants cannot have, in my view, any right to change their fronts. There is no doubt in my mind that the proposed amendment will put the plaintiff in such a position that he cannot be recouped, as it were, by any allowance of cost or otherwise.

For these reasons, I dismiss encls 91 and 78 with costs.

It is also relevant to reproduce the finding of the learned judge who heard the appeal:

Reasons:

Under O 20 r 5 of the Rules of the High Court 1980, the court may at any stage of the proceedings allow any party to amend his pleading. The court therefore has the discretion which is not fettered by the previous exercise of the senior assistant registrar's discretion (see *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97).

I allow both the appeals in regard to encls 102 and 103 for the following reasons:

(i) the amendments are basically for the extension of the period of equity, ie from 35 years to 99 years in respect of encl 78, and from 30 years to 99 years in respect of encl 91;

(ii) in the statement of defence, equity has been originally pleaded in para 8(1). Therefore, such amendments are no surprise to the plaintiff. Furthermore, amendments do not amount to a new cause of action;

(iii) how equity is to be satisfied is up to the court after full hearing of the case. The parties pleading equity are not automatically entitled to it thereto. They still have to prove their case;

(iv) the hearing of the case has not commenced; and

(v) the amendments sought are well within limitation. Therefore, the question of limitation does not arise.

For reasons aforesaid, the court feels that it is just to grant leave to amend in the circumstances of the case as no prejudice will be caused to the plaintiff.

The review of judicial discretion by an appellate court has been dealt with recently in *Hongkong Bank (M) Bhd v Raja Letchumi a/p Ramarajoo & Ors* [1996] 2 MLJ 34 where this court held at pp 43–44 as follows:

(b) Review of discretion by an appellate court

There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere 'measuring cast' or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion (*Charles Osenton & Co v Johnston* [1942] AC 130 at p 148 per

A Lord Wright). The Privy Council held in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to *Evans v Bartlam* [1973] AC 473.

B The House of Lords, approving the decision of the English Court of Appeal in *Ward v James* [1966] 1 QB 273, held to the same effect in *Birkett v James* [1978] AC 297 (at pp 317 and 326). For good measure, we would refer to the felicitous expression of Goulding J in *Re Reed (A debtor)* [1979] 2 All ER 22 on this point (at p 25):

C '... the duties of an appellate court in such a matter as this are, in my judgment, confined to those normally exercisable where the lower court has a discretion, that is to say, we are not justified in setting aside or varying an order simply because we may think we might have come to a different conclusion ourselves on similar material. We can only interfere if either we can see that the court below has applied
D a wrong principle, or has taken into account matters that are in law irrelevant, or has excluded matters that it ought to have taken into account, or otherwise that no court, properly instructing itself in the law, could have come to the conclusion which in fact was arrived at.'

In the matter before us, the learned deputy registrar had dismissed the
E respondents' applications to amend their statements of defence but the learned judge had disagreed. In *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97, the (then) Supreme Court ruled that in an appeal from a discretionary order of the senior assistant registrar to a judge in chambers, the judge should exercise his own discretion as though the matter was before him for the first time, unfettered by the
F previous exercise of the senior assistant registrar's discretion. The judge should give the decision the weight it deserved; and since the senior assistant registrar gave only a bare decision or a simple *ipse dixit* — and not a judgment — it deserved no weight at all. Yet the judge gave some weight to the decision of the senior assistant registrar. Furthermore, although the
G matter before the judge was in form an appeal, it took the shape and style of a rehearing. The judge was therefore wrong in treating the matter as an appeal and by taking the approach that he was not to exercise an independent discretion of his own, but had to defer to the senior assistant registrar's exercise of his discretion and could not interfere with it merely on the ground that he would have exercised it differently. The learned High
H Court judge here was aware of this authority and on that premise, had differed from the learned deputy registrar.

The Federal Court in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 had laid down guidelines applicable when amendments to the pleadings are applied for. The court said that (at
I pp 214–215):

> The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result:

(a) whether the application is bona fide; (b) whether the prejudice caused to the other side can be compensated by costs; and (c) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

In *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230, the Supreme Court in a majority decision held that (at p 232):

> The court has power to grant an amendment after the expiry of the limitation period notwithstanding that the effect of the amendment will be to add or substitute a new cause of action, subject to one very important condition, namely, that the new cause of action must arise out of the same or substantially the same facts as the cause of action in respect of which relief had already been claimed.

In *Palaniappan v Universiti Pertanian Malaysia* [1995] 1 MLJ 353, where the defendant had objected to the plaintiff applying for the fourth time to amend his statement of claim, the High Court ruled (holding (1) at the same page):

> The courts have a wide discretion whether or not to allow an amendment. The proper test to apply is not whether the amendment would cause injustice to the other party, but whether in the circumstances of the case, it was just to grant leave. In exercising its discretion, the courts have to balance the prejudice involved to both the parties in allowing or disallowing the amendment. Generally, the courts readily grant leave to amend before trial, so long as the application is made in good faith and within a reasonable time and so long as the injustice caused to the opponent can be compensated by costs.

In *Grant Advertising International Inc & Anor v Glaze* [1968] 1 MLJ 31, it was held (holdings (1) and (2) at the same page):

> Although the plaintiffs were seeking to introduce a new cause of action in tort in addition to their original cause of action, the new cause of action did not turn a suit of one character into a suit of another and inconsistent character. It merely added a new cause of action which concerned the same parties and which involved substantially the same facts and arose out of the same transaction inter partes; and the plaintiffs must be allowed the conversion of the writ with the necessary indorsement.

Page 374 of the *Supreme Court Practice* (1995) Vol 1 Pt I is of some assistance and is reproduced for effect:

> 20/5–8/9 *At what stage of the proceedings amendments are allowed* — Rules 5 and 8, expressly state that an amendment may be allowed 'at any stage of the proceedings' (*Roe v Davies* (1876) 2 Ch D 729 at p 733) and amendments may be allowed before, or at, or after the trial, or even after judgment or on appeal (*The Duke of Buccleuch* [1892] P 201; *GL Baker Ltd v Medway Building & Supplies Ltd* [1958] 1 WLR 1216; [1958] 3 All ER 540, CA). As a general rule, however late the amendment is sought to be made, it should be allowed if it will not do the opponent party some injury or prejudice him in some way that cannot be compensated for by costs or otherwise (see eg *Clarapede v Commercial Union Association* (1883) 32 WR 262, where an

A amendment of unseaworthiness was allowed eight months after the original defence was delivered and after the return of a commission to take evidence abroad). But different considerations apply to different stages (*The Duke of Buccleuch* [1892] P 201; *Ecklin v Little* (1890) 6 TLR 366; *The Alert* (1895) 72 LT 124).

B 20/5–8/10 *Before the trial or hearing* — Leave is readily granted, on payment of the costs occasioned unless the opponent will be placed in a worse position than he would have been if the amended pleading had been served in the first instance (*Steward v North Metropolitan Tramways Co* (1886) 16 QBD 556) or some injury caused to him for which he cannot be compensated by payment C of costs (see 'Costs no remedy,' paras 20/5–8/19). Thus, a plaintiff will be allowed to amend by adding a claim for special damage when proof of special damage is essential to the cause of action (*Weldon v Neal* (1887) 19 QBD 394) or to add a new claim which is 'so germane to, and so connected with, the original cause of action, that it would be a denial of justice' if D leave to add it were refused (*A–G v West Ham Corp* (1910) 74 JP 196, CA). A plaintiff may add a new cause of action, the defendant a new defence. The costs are always in the discretion of the court; in some case they will be reserved to abide the event, or for the judge at the trial to award (see *Roe v Davies* (1876) 2 Ch D 735).

E There will be difficulty, however, where there is ground for believing that the application is not made in good faith. Thus, if either party seeks to amend his pleading, by introducing for the first time allegations of fraud, or misrepresentation or other such serious allegation, the court will ask why this new case was not presented originally; and may require to be satisfied as F to the truth and substantially of the proposed amendment (*Lawrance v Norreys* (1890) 39 Ch D 213; see judgment of Stirling J at p 221, and of Bowen LJ at p 235).

The House of Lords in *Ketteman & Ors v Hansel Properties Ltd & Ors* [1987] 1 AC 189 had stated (per Lord Griffiths at p 220):

G Mr Odgen submitted that the authorities obliged a judge to allow an amendment no matter how late it was made nor for what reason provided the other party could be properly compensated by an award of costs. He relied upon the authorities set out in The Supreme Court Practice and in particular the decision of Brett MR in *Clarapede & Co v Commercial Union Association* (1883) 32 WR 262 at p 263:

H

> 'The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; ...'.

I This was not a case in which an application had been made to amend during the final speeches and the court was not considering the special nature of a limitation defence. Furthermore, whatever may have been the rule of conduct a hundred years ago, today it is not the practice invariably to allow a defence

which is wholly different from that pleaded to be raised by amendment at the end of the trial even on terms that an adjournment is granted and that the defendant pays all the costs thrown away. There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time.

Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it is possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.

Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall upon their own heads rather than by allowing an amendment at a very late stage of the proceedings.

The authorities strongly indicate that the courts should lean towards granting applications for amendments even when a new cause of action or line of defence is raised, provided it is based on the same facts or arose out of the same transaction subject, however, to an award of costs to the other party for the injustice caused by the amendments. On these considerations, we agree with the learned judge that as far as the amendments were concerned, there is no basic departure from the original pleadings which were grounded on the principles of equity. The sudden change applied for from 30 and 35 years respectively to 99 years is of course not yet explained but a trial would certainly determine all issues, and the appellant cannot be said to be really prejudiced if the amendments were allowed except on his objection that the existing lease — as originally pleaded by the fifth respondent in particular and not pleaded at all by the first, third, fourth and sixth respondents — was only for three years commencing from September or October 1992 which would have ended a year ago. However, there was no written tenancy apart from the averments in the original pleadings and that was actually an oral agreement between the vendor and the fifth respondent at around the same time the said premises were being sold to the appellant.

Accordingly, we dismiss this appeal with costs and confirm the learned judge's order except that the costs in the court below should go to the appellant as compensation for the amendments being allowed. In this situation, the deposit for this appeal is to go to the respondents to account

of their taxed costs. We were, however, quite unhappy with the change of stance and strategy of the respondents at this point of time; and although we could not really pinpoint any visible element of bad faith in making these amendments, we would, in these circumstances, direct that the trial be heard before another judge within four months of this order.

Appeal dismissed.

Reported by Rudeen Chua